DECISION OF DISTRICT COURT TAKEN FROM REPORTER'S TRANSCRIPT, SEPT. 25, 1973

. . . . I have read your pretrial briefs and done some research on my own. I don't think any lengthy argument would be of assistance to the Court. I am ready to give my decision right now.

So the following remarks shall consist of the opinion and decision of the Court, including the findings of fact and conclusions of law.

This case came on for trial on September 24 and September 25, 1973, in this department. The plaintiff, Herbert H. Dean, appeared in person and through his attorney, Nancy Reardan, Esquire, and the defendant, Ford Motor Company, appeared through its attorneys, Charles Prael and Huali Mullins.

This is a Civil Rights action brought under Title 7, Section 706(f) of the Federal Civil Rights Act of 1964. The defendant is a corporation. It assembles automobiles at its plant at San Jose for sale and distribution in interstate commerce. It employs in excess of 3,500 employees in said plant.

The plaintiff is a Negro and was employed as an hourly employee by the defendant at its San Jose plant from July 25, 1966, to January 11, 1972. During said period of time, the plaintiff alleges that he made application for promotion to foreman, and also that he had made application for transfer to the Cushion Department of said plant; and further alleges that the plaintiff was denied promotion or transfer by the defendant because of his race or color.

There has been some evidence in the case with reference to statistics showing a comparativly few number

of racial minorities being hired or promoted during the relevant years, and, of course, it is well known that the courts have held statistics showing a comparatively small number of racial minorities hired or promoted is sufficient to establish a violation of Title 7 of the 1963 Civil Rights Act (*Parham* v. *Southwestern Bell Telephone Co.*, 433 CAR, 1970); also, that the 1964 Civil Rights Act encompasses present and continuing effects of past discrimination, and relief may be granted to remedy such discrimination (*Griggs* v. *Duke Power Co.*, 420 F. 2d 1225) and *U.S.* v. *Brotherhood of Carpenters and Joiners of America, Local 169*, CA Illinois 1972), and also, whether there has been discrimination in the past, those employees who have been discriminated against have the right to have their expectations raised even if the expectations of others must be lowered in order to achieve statutory mandated equality (*Robinson* v. *Lorillard Corporation*, 404 U.S. 1006).

However, this Court is of the opinion that the case involving Dean versus Ford Motor Company is not to be governed—to be decided with reference to the criteria and statistics and proposition heretofore enunciated. However, it should be governed by the decision of McDonnel Corporation – *McDonnell Douglas Corporation* v. *Green*, 36 Lawyers Edition 2d. 668, decided May 14, 1973, wherein the Court held – the United States Supreme Court held that in a trial under Title 7 of the Civil Rights Act of 1964, which requires equal employment opportunities, the complainant must carry the initial burden of establishing a prima facie case of racial discrimination. This may be done by showing, one, that he belong to a racial minority; two, that he applied and

was qualified for a job for which the employer was seeking applicants; and, three, that despite his qualifications he was rejected; and four, that after his rejection the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.

So initially it is incumbent upon a plaintiff in an action under this section to satisfy each of the four requirements, and the crucial requirements to be satisfied in this instant case are the requirements set forth by the Court in Number Two, which is that the plaintiff must prove a prima facie case that he has applied and was qualified for a job for which he was employed and was seeking – and was qualified for the job for which the employer was seeking applicants.

So we have two issues: One, did he apply; and, two, was he qualified for the job. This is the burden that the plaintiff must first carry and this is the burden to be proved in order to establish his prima facie case. So the issues boil down to, in this particular case, did the plaintiff file an application, and, two, has the plaintiff established that he is qualified for the job. Therefore, the basic issue is when did the unlawful, if such is the case—when did the unlawful employment practice occur.

Now with reference to "Did the plaintiff file an application," the testimony, as the Court finds, is that the plaintiff filed his first application on November the 12th, 1967. [Now the plaintiff has stated this on direct—on the cross-examination, setting forth the date to be November 12, 1967. On *rebuttal* he has contended that it was not on that particular date but on another date.

However, the issue then comes to a question of credibility of the witness, and the Court finds that the date which he did state, November 12, 1967, even though this date is not a crucial date with reference to the Act here, because of Section 706(d) – might not very well apply to the November, 1967 contention. But assuming that it did apply to the November, 1967 contention, the plaintiff has stated that he handed his application to Mr. Rossi. However, *Defendant's B in evidence* shows that Mr. Rossi was not the plaintiff's foreman and, therefore, under the procedures, any handing to Mr. Rossi would have been to no avail because Mr. Rossi – the last date Mr. Rossi was a foreman was on January 31, 1967.] (Emphasis added.)

Also, there has been no evidence whatsoever to substantiate a request for a transfer to the Cushion Department in February of 1966.

Now with reference to the application of June 10, 1968, the plaintiff, on cross-examination, indicated that that was the date that he submitted his application to Mr. O'Brien. However, on rebuttal, having been confronted with this date, it states that it was in the midsummer. However, in raising the fact that it was handed to O'Brien on June 10, 1968, which was his testimony on direct and also his testimony at the deposition, Defendant's D, E, F and G in evidence show that Dean was not working that day as the plant was shut down, and also that Green – a Mr. Green was his foreman and not Mr. O'Brien.

Mr. O'Brien, having taken the stand, states that Mr. Dean, "Never gave me a filled-out form for any promo-

tion," and he identified the plaintiff and stated that at no time did he ever hand him an application.

Also, the only evidentiary matter we have of a request by the plaintiff of wanting a promotion was in the form of the complaint that was subsequently filed with the Equal Employment Opportunity Commission on October 8, 1968, and the Court takes great cognizance of the fact and places great importance on the fact that during the interim from November – or during any period if you assume what the plaintiff says is correct– of any period during 1967, or June or the mid-year, 1968, where he states he made application for promotion, in the letters that he wrote on behalf of the Committee for Equality and Opportunity – the letter of September 5th, 1968, and the subsequent letters – at no time therein does he mention the fact that he, himself, has been a victim of discrimination because of his application having been turned down or not being acted upon, and the Court places a great deal of emphasis upon the letter that was written by Mr. Riddle who was the Plant Manager, which came into evidence as Plaintiff's Exhibit No. 2 and is dated September 19, 1968, which letter is directed to Mr. Dean, the plaintiff herein, in which it states: "We are pleased to include in our response the request that you or any other employee refer any individual applications to us on behalf of yourself or acquaintances whom you believe qualified for employment, either salaried or hourly. Such applications will receive sincere consideration for any openings that arise."

Now in response to that, the plaintiff filed no application, filed no request for – or filed a contention that

he had filed an application which was not acted upon, but remained silent until he filed his complaint on October 8, 1968, and the Court is of the opinion that the plaintiff should have acted, if his contentions were correct – he should have acted in response in some manner to the September 19, 1968 letter rather than to remain silent. This would go to bear upon the weight to be given the testimony that is counter to the testimony that he file applications on the two dates that he suggests.

Therefore, the Court feels that the plaintiff has not made a prima facie showing and is of the opinion and finding that the plaintiff has not made a prima facie showing that he had, in fact, made an application for the position of foreman.

The second part of number two, as set forth by the Supreme Court, states that he must make a showing he was qualified for a job for which the employer was seeking applicants.

Now the only evidence that we have that he was qualified is evidence that he was working as an assemblyman and also the fact that he held three degrees, a Bachelor of Science degree from Arizona State, a Master's degree in Sociology from the University of California and an LLB from Lincoln School of Law in the Bay Area.

Now other than these two items, there is no other evidence in the case that would establish the fact that this plaintiff was qualified to hold the job.

Now granted at first blush we would say: Well, any individual who holds a Bachelor's degree and a Master's degree and an LLB should, ipso facto, be qualified to

hold a foreman's job. That may or may not be true. Just because I hold an LLB and a J.D. degree doesn't necessarily mean I am qualified to hold a foreman's job because of the criteria that has been established for those positions as set forth by Mr. Kelly who is the Industrial Relations supervisor. He was supervisor of Salaried Personnel and Training at the plant and states that a person can be an excellent assemblyman yet not make a good foreman. Also, he set forth the duties and criteria to be established in order to make – to perform the duties of a foreman, and they are, among other things, to maintain production, responsibility for stock, parts, for the direct labor standards, for quality of the car, to maintain costs – keep costs down – maintain time sheets and a process book, and the first stage of any grievance that the employees may have, and also that he himself, should have a good attendance record. So there are certain quailties that are inherent in this position that are superior to those qualities that are necessarily included in those of any assemblyman. So there should be some evidence to show this plaintiff does have those qualities.

Also, Mr. O'Brien set forth this morning some of the qualities that should be had with reference to being a foreman in the nature of the responsibilities and, in fact, they are higher than the fact that you have to be able to handle people. Each one is handled differently. In fact, he said you have to be part mother, father and babysitter. In other words, you have to be a person that is going to be able to handle 15 to 25 people under your command.

Now it may be inferentially an individual holding a degree in Sociology and an LLB might be able to fill these criteria, and certainly, having witnessed Mr. Dean on the stand, he is certainly an intelligent, articulate, personable individual. But that, standing alone, is not sufficient to fill the criteria for this particular job of foreman.

Mr. O'Brien who testified this morning, even through at his young age he was able to acquire the position of foreman, he was a journeyman mechanic prior to that time. So degrees in college don't necessarily mean qualification of an individual for a particular position, and especially when the burden is upon the plaintiff in this position to establish his qualifications.

The evidence that the plaintiff has presented forward is the evidence of Mr. Lusk who states that the plaintiff was a good technical worker and he was a conscientious employee. Mr. Kennedy states he was a conscientious employee and did his work well. However, both of these people that made these statements are not formen. Being a concientious employee and doing your work well as an assemblyman doesn't necessarily conclude that one would do the work well as a foreman in this particular position.

Now when Mr. O'Brien, who had been Mr. Dean's foreman at one time, was asked the question, "Was Mr. Dean a good worker," he retorted with the answer that he was a fair worker and also, as I stated before, stated that he had not received any application from Mr. Dean.

Therefore, there is no evidence here that would establish the criteria sufficient to satisfy Point Two of the Supreme Court's ruling with reference to the unlawful practices and being able to sustain a prima facie case.

Now the crucial question in this case, as I said before, is whether or not there was an unlawful employment practice which occurred, and the Court finds that there was no evidence that an application for foreman was filed, nor that there is evidence – prima facie evidence – to sustain the fact that the plaintiff was qualified for the position, given the fact and understanding that the Court has knowledge of the plaintiff's educational level. And I merely point this out because of the fact that the evidence must show that he does come within the qualities necessarily incumbent upon an individual to be a foreman, and I don't want to take away from the fact that this gentleman is highly educated. But that doesn't necessarily mean just because you are highly educated and you have expertise in certain fields that you then become expert in all fields, and especially those of us who have LLB degrees. Sometimes we begin to think we are expert in all fields. Unfortunately we are not expert in all fields.

So the Court's finding is that the plaintiff has not sustained his burden of proof, and the conclusion of law that the defendant has engaged in no unlawful employment practice against the plaintiff under Title 7 of the Civil Rights Act of 1964; and that this Court has jurisdiction of this action by virtue of Section 706(f) of the Civil Rights Act of 1964. Further, that the plaintiff is not entitled to back wages, injunction or costs or any other relief against the defendant and the defendant is entitled to its costs.

That is the judgment of the Court, gentlemen and ladies. Thank you.

(Whereupon the proceedings were adjourned.)